UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHIP'S WETHERSFIELD, LLC D/B/A CHIP'S FAMILY RESTAURANT and JACQUELINE RODRIGUEZ, AN INDIVIDUAL	CASE 01-CA-217597 OCTOBER 23, 2019

CHIP'S WETHERSFIELD'S BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE ADMININSTRATIVE LAW JUDGE'S DECISION

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Administrative Law Judge Elizabeth M. Tafe conducted a hearing on November 5, 2018 and on November 6, 2018 regarding the alleged violation of the National Labor Relations Act (hereinafter, the "Act") by Chip's Wethersfield, LLC (hereinafter, "Chip's Wethersfield"). Jacqueline Rodriguez (hereinafter, "Rodriguez"), an individual charging party, alleged in a charge dated April 2, 2018, which was thereafter amended on May 24, 2018, that Chip's Wethersfield violated Section 8(a)(1) of the Act by discharging her in violation of Section 7 of the Act. Specifically, Rodriguez alleged that she was discharged because she engaged in concerted protected activities. It was also alleged that Chip's Wethersfield violated Section 8(a)(1) of the Act by prohibiting employees from discussing work related incidents with other employees.

As set forth herein below, and as indicated in the exceptions filed herewith, Chip's Wethersfield submits that the decision of the ALJ is contrary to the record and established National Labor Relations Board (hereinafter, the "Board") precedent. For the following reasons, Chip's Wethersfield's exceptions to the ALJ's findings of fact and conclusions of law should be sustained, the Decision vacated, and the allegations in the NLRB charge be dismissed in their entirety.

I. STATEMENT OF THE CASE

A. SUMMARY OF THE ARGUMENT

The charge alleged, and the ALJ found, that Chip's Wethersfield violated Section 8(a)(1) of the Act, which provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 section 157 of this title." The ALJ specifically determined that Chip's Wethersfield violated the Act by "discharg[ing] Rodriguez based on her protected concerted activity on October 8, 2017," which was determined to be Rodriguez' criticism of Olden *with* other employees, and "on October 4, 2017, [when] Cuozzo informed Rodriguez by e-mail that employees were prohibited from discussing with other employees work-related incidents and managers' statements." *See Decision*, pg. 18, 5:9 to 5:14.

The General Counsel did not meet its burden in this case with respect to the allegations presented in the charge. Despite this failure, the ALJ sustained the General Counsel's allegations by selectively disregarding evidence in the record; by improperly and unjustifiably making credibility determinations; and by using speculation, conjecture and surmise to supplement the deficient record. Additionally, the ALJ selectively read the record, misapplied precedent, and disregarded undisputed facts in finding violations of the Act. Further, the ALJ did not base her decision on the "preponderance of the testimony" as required by the Act. 29 U.S.C. § 160(c). As set forth below, these deficiencies resulted in erroneous findings of fact and conclusions of law.

For example, the ALJ sustained the General Counsel's allegation that Chip's Wethersfield discharged Rodriguez for having "engaged in protected concerted activity on October 2 when she protested that Olden had discriminatorily refused to allow D. Bachand to serve a customer who requested to be served by [Bachand]." *See Decision*, 12:24 – 12:26. The ALJ surmised that

Rodriguez' conduct constituted protected, concerted activity because "Rodriguez and D. Bachand had discussed their concerns before Rodriguez raised them with Olden, but also because it grew out of the earlier list of complaints that servers had created and that Rodriguez had personally delivered to management . . ." *See Decision*, 12:26 – 12:29. Rather than considering the applicability of the *Wright Line* standard, the ALJ summarily held that "the Board's decision in *Atlantic Streel Co.*, 245 NLRB 814 (1979), provides the appropriate analytic framework for determining whether the discipline is discriminatory in violation of Section 8(a)(1)." *See Decision*, 12:41 – 12:43. Consequently, the ALJ improperly assumed – without analysis – that Rodriguez had engaged in a concerted activity when she confronted assistant manager Santosha Olden. Notably, the ALJ relied upon *Entergy Nuclear Operations*, 2019 NLRB LEXIS 302 (N.L.R.B. May 21, 2019).

It is clear, however, that *Entergy Nuclear Operations* does not support the ALJ's assumption. As the Board in *Entergy* determined,

> [e]mployees engage in protected concerted activity when they act 'with or on the authority of other employees and not solely by and on behalf of the employee himself.' . . . In [*Entergy*], Amaral was raising a group concern when she discussed the removal of the water dispenser with Lowther on March 13. Earlier that day, Amaral had been approached by employees who complained about the removal of the water dispenser ***and*** **asked Amaral what action she planned to take about it**. During her interaction with Lowther, Amaral referenced [the groups concerns].

Entergy Nuclear Operations, 2019 NLRB at *57-58 (emphasis added). In other words, the *Entergy Nuclear Operations* opinion – and by extension the *Atlantic Steel* opinion – applies where an employee raises a group concern *on behalf of a group* that has asked for or authorized assistance from a group representative.

In this instant matter, the ALJ ignored facts which establish that Rodriguez was not asked by Bachand to confront Olden on her behalf (and Rodriguez did not ask Bachand if she could

confront Olden on Bachand's behalf); ignored the meaning of the very legal precedent relied upon (*Entergy Nuclear Operations*); improperly credited Rodriguez' testimony; and determined conduct to have occurred which has no factual basis in the record. *See* Exception 25 (Rodriguez testified that ". . . after Denise tells [her that she cannot serve the customer] . . . [she] went to Ms. Santosha and [she] told her, like this is not what George would do . . ." November 5, 2018 Hearing Transcript, pg. 74, lines 8 – 14.). Because the issue as to whether Rodriguez was a group representative with regard to the October 2 incident was improperly determined, in that even Rodriguez does not claim Bachand authorized her confrontation, the *Wright Line* test should have been applied. The *Wright Line* test employs four (4) factors that are different from the four (4) factors in the *Atlantic Steel* test, which clearly impacts the determination of whether Section 8 has been violated under the facts alleged. Further, to the extent that a disputed motive is alleged, *Wright Line* should have been applied instead of *Atlantic Steel*. *See Inova Health Sys.*, 360 N.L.R.B. 1223, 1226, 2014 NLRB LEXIS 538, *18-19 (N.L.R.B. June 30, 2014).

As will be discussed below, the ALJ's erroneous findings of fact and conclusions of law favor the granting of the exceptions filed by Chip's Wethersfield, and the dismissal of the charge.

B. STANDARD OF REVIEW AND WITNESS CREDIBILITY

The ALJ sustained the General Counsel's allegations by selectively disregarding record evidence in the record; by making (or failing to make) credibility determinations; and by allowing holes in the record to be filled by speculation, conjecture and surmise. These issues were compounded by the ALJ's selective reading and application of facts and precedent. The result is a decision which should be discarded, including for the reason that it fails even to comport with the "preponderance of the testimony" standard required by 29 U.S.C. § 160(c). As further set forth below, the ALJ's decision rests upon erroneous findings of fact and conclusions of law.

The General Counsel bears the burden of establishing each element of the prima facie case; the discrediting of evidence presented by the employer is insufficient to sustain or support the General Counsel's obligation to prove its case. *KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975); *see also NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) ("The mere disbelief of testimony establishes nothing."). *See also NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001) citing the Administrative Procedure Act, 5 USC § 556(d); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 US 267, 276-278 (1994) (The General Counsel bears "the burden of proving the elements of an unfair labor practice, which means that it bears the burden of persuasion as well as of production.") .

Importantly, in reviewing the exceptions and argument filed by Chip's Wethersfield, the Board is not bound by the ALJ's findings of fact or conclusions of law; rather, the Board may make its own determinations based upon the evidence, including credited testimony. 29 USCS § 160(c); *Loomis Courier Service, Inc. v. NLRB*, 595 F.2d 491, 495 (1979). With regard to credibility determinations, however, the ALJ's can be overruled if there is a showing, upon the clear preponderance of relevant evidence, that the testimony is incorrect. *See, e.g., Daikichi Sushi*, 335 NLRB 622, 623 (2001); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). In this regard, it is critical to note that "an Administrative Law Judge cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word 'demeanor.'" *Permaneer Corp.*, 214 NLRB 367, 368-69 (1974). *See* Exception 8.[1] Ultimately, an ALJ's insufficiently explained or biased credibility determinations are not impervious and

[1] *See, e.g.*, Judge Richard A. Posner, REFLECTIONS ON JUDGING, p.124 (2013) (Explaining that "nonverbal clues to veracity are unreliable and distract a trier of fact . . . from the cognitive content of a witness' testimony" and collecting authority). *See also Permaneer Corp.*, 214 NLRB 367, 368-69 (1974).

should be disregarded by the Board. *Int'l Longshoremen's Ass'n*, 2018 NLRB LEXIS 97 (2018).

C. STATEMENT OF FACTS

Rodriguez was hired by Chip's Wethersfield, LLC in or about October of 2014. She worked at the Chip's Wethersfield restaurant in Wethersfield, Connecticut as a server until October 8, 2017. Laura Robertson, General Manager of Chip's Wethersfield, made the decision to terminate Rodriguez' employment because she engaged in insubordinate, hostile and highly disruptive workplace behavior, culminating in an incident on October 2, 2017 (discussed further below). *See* Exception 37. During the October 2, 2017 incident, Rodriguez yelled at Santosha Olden, an assistant manager, in front of or observable to (by hearing or otherwise) customers and co-workers. *See* Exception 38. *See also* Exception 32. This October 2, 2017 incident followed a similar incident on September 18, 2017 (discussed further below) during which Rodriguez yelled at a cook in front of customers and co-workers. *See* Exception 32. *See* also Exception 37. Following an investigation into the incident, Ms. Robertson determined that Rodriguez was unapologetic in her repeated refusal to follow those Chip's Wethersfield policies and procedures with which she disagreed.[2] *See* Exception 37. Ms. Robertson also determined that Rodriguez' conduct and attitude was negatively affecting Chip's' business, providing it a legitimate business

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9	Q.	So as it relates to the incident on October 2nd and the
10		incident which you've described as sometime in September with
11		the cook, did she ever apologize for her behavior on those two
12		days?
13	A.	Not that I can remember.

See November 6, 2018 Transcript, pg. 190, lines 9 – 13.

interest to support its decision to discipline Rodriguez.[3] *See* Exceptions 5 and 37.

Notably, the server aisle where these confrontations initiated by Rodriguez is in the middle of the restaurant and not ". . . out of view of customers . . ." as asserted by the ALJ. *See Decision*, pg. 13:29 – 13:30. In this regard, it is notable that Rodriguez merely testified that there is a 'wall' that gives cover. *See* November 5, 2018 Transcript, pg. 48, lines 9 – 11 ("There's a -- like a main -- like a wall and then you can't see like – I don't how to explain it. It's just that they can't see. It's cover."). However, Robertson testified and more clearly confirmed that the server aisle is in the middle of the restaurant and that the partition does not entirely segregate the server aisle from the main floor; the partition is approximately six (6) feet tall. *See* November 6, 2018 Transcript, pg. pg. 210, lines 2 – 7 (The server aisle is". . . in the middle of the restaurant, yes, in line with the kitchen. . . . [It is n]ot completely [segregated from the floor]. . . . [The partition] goes up probably not more than six feet."). Therefore, Rodriguez' confrontations were not *per se* 'out of view' of customers (or co-workers) and, even if the partition did provide an effective separation from a confrontation being visible, it uncontestably could not prevent a customer (or a co-worker) from hearing a confrontation.

In making these determinations, Ms. Robertson interviewed both Rodriguez and Denise Bachand, and also reviewed Bachand and Rodriguez' previous histories of insubordinate

[3] *See Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595, 604-05 (1st Cir. 1979) ("Standing alone, Agacinski's distribution of the two memoranda and the solicitation of his co-workers was protected activity under section 7 of the Act, 29 U.S.C. § 157. However, when he threatened to be disruptive, declared war on management, missed appointments, and refused to meet with his superior as requested, he cast off the protective mantle of the Act and exposed himself to the disciplinary rigors of his employer. Partial strikes or intermittent work stoppages are not protected activity, nor are activities that are unlawful, violent, disloyal, insubordinate, or in breach of contract. Agacinski's behavior, while not typifying all of the above, was clearly insubordinate and may be fairly categorized as constituting a partial strike, or 'a strike on the installment plan.' *C. G. Conn, Ltd. v. NLRB*, 108 F.2d 390 (7th Cir. 1939).").

workplace conduct.[4] *See* Exception 35. *See also* Exhibits RX1 to RX8.

i. The Guest Check Notes

Rodriguez testified that she and several servers wrote comments about Santosha Olden on a guest check. *See* Exceptions 17, 18, 26 and 28. Ms. Rodriguez claims that the meeting at which these comments were written down was held at the request of George Chatzopoulos, and that she gave this document to Joel Martinez. *See* Exceptions 17 and 18.[5] Chip's Wethersfield, LLC does not challenge the conclusion that the act of meeting to write down comments is a concerted act. Though the list was allegedly given to Mr. Martinez, there is no testimony or evidence to confirm that Mr. Martinez received the list or provided the list to Mr. Chatzopolous, Ms. Robertson or Mr. Cuozzo. *See* Exceptions 17 and 18. Rodriguez confirms that there was never a meeting to discuss this list and does not allege that the list was discussed at any time. *See* Exhibit GCX7 ("'[T]he meeting' never took place and unfortunately there was an incident on October 2 that also involved a regular guest and as a result I have been taken off the schedule 'pending an investigation'."). Notably, Ashley Curtis, a server who was subpoenaed to testify by the General Counsel, confirmed that between the date that the list was created and the date of her testimony (November 5, 2018)

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8	Q.	So you felt discipline was appropriate because of
9		insubordination?
10	A.	Yes.
11	Q.	You felt discipline was appropriate because of her conduct
12		in the restaurant itself?
13	A.	Yes.
14	Q.	Did you consider her past record of discipline?
15	A.	I took that in consideration.

See November 6, 2018 Transcript, pg. 215, lines 8 – 15.

[5] *See Petro-Chem. Insulation, Inc.*, 1997 NLRB LEXIS 814, *89-91 (N.L.R.B. September 30, 1997).

she did not raise the issues with management and that she had not seen the list since it was transcribed. *See* November 5, 2018 Hearing Transcript, pg. 30, lines 7 – 12.[6] This highly salient and probative fact was ignored by the ALJ in her decision.

ii. The September 18, 2017 Incident

On September 18, 2017, Rodriguez was involved in an incident with a cook that was the result of her knowing and intentional failure to follow Chip's Wethersfield policy. *See* Exception 37. *See also* Exhibit GCX10, September 19, 2017 E-mail ("After that me and Carlitos exchange (sic) a few words.").[7] As to the knowing and intentional nature of her failure, Rodriguez admitted that she failed to follow the policy requiring customer orders to be typed into the computer. *See* Exception 37. *See also* Exhibit GCX10, September 19, 2017 E-mail ("I understand that's the proper way to do this . . . Granted I should of (sic) put the food the right way in the first place and maybe this whole situation could of (sic) been avoid it (sic)"). Mr. Chatzopoulos did attempt to discuss this incident with Rodriguez during the interview that followed the October 2, 2017 incident; he did so in order to give Rodriguez an opportunity to acknowledge her insubordinate,

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7	Q	Okay. And did you present any of the complaints that are
8		contained in these handwritten notes to Ms. Robertson? For
9		instance, did you give this set of notes to Ms. Robertson?
10	A	No, as I said, I hand them to Ms. Rodriguez. I wasn't
11		aware of what happened with them after that. I haven't seen
12		them until today.

7

1	Q	And did you complain to him when he quote/unquote didn't
2		get it going because of a piece of paper as opposed to the
3		computer?
4	A	Yes.

November 5, 2018 Transcript, pg. 164, lines 1 – 4.

hostile and highly disruptive workplace behavior.[8] Rodriguez failed to acknowledge the nature of her conduct, or that it was becoming a pattern that was negatively affecting Chip's' business; instead, Rodriguez attempted to justify her violation of Chip's' policies and procedure based upon her view of what was appropriate.[9] As with the guest check noted above, this highly salient and probative fact was ignored by the ALJ in her decision.

iii. The October 2, 2017 Incident

On October 2, 2017, Rodriguez yelled at an assistant manager, also in front of and observable to customers and co-workers (audibly or otherwise). *See* Exceptions 10, 22, 32 – 37. On that date, Ms. Robertson received a telephone call from Ms. Olden, who was employed as an Assistant Manager at the Wethersfield, Connecticut location of the restaurant. Ms. Olden informed Ms. Robertson that Rodriguez had confronted her about the decision 'cutting' Ms. Bachand from

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[8] Rodriguez testified that she did not raise her voice while confronting the cook. *See* November 5, 2018 Transcript, pg. 165, lines 1 – 2. However, this testimony conflicts with the fact that she also testified that it was "steady" on that day and that "[t] here was noise . . . the people that were there, people asking for the food, the music and the intercom." *See* November 5, 2018 Transcript, pg. 162, lines 4 – 16. The confrontation Rodriguez initiated was in front of or observable to customers and co-workers.

[9]

18		Was there a work rule at issue in that issue in September?
19	A.	Yes.
20	Q.	And what was the work rule?
21	A.	Just regarding how items were entered into the computer as
22		well as the kitchen understanding they make what gets sent
23		through the computer, not just things that servers ask them to
24		make.
25	Q.	Okay. So is it appropriate for a server to like ask the
1		computer and hand the cook a piece of paper?
2	A.	No.

November 6, 2018 Transcript, pg. 189, lines 19 - 25; pg. 190, lines 1 - 8.

service, which meant that she was no longer taking new tables. *See* Exceptions 10, 19, 20, 22 and 25.

With regard to the incident, Rodriguez' confronted Ms. Olden on the server line/server aisle, which is located by the food window of the restaurant (where food is moved from the kitchen to be picked up for delivery by servers). *See* Exception 38. During the incident, Rodriguez stated her erroneous belief that Mr. Chatzopoulos would never have turned away a customer. *See* Exception 25. Rodriguez, who had gotten loud such that customers and co-workers were able to hear the confrontation, began yelling at Ms. Olden and shouted that she was a bad manager.[10,11] *See* November 16, 2018 Transcript, pg. 228, lines 23 – 25; pg. 229, line 1. *See* Exceptions 10, 19, 20 22 and 25. Ms. Robertson and Mr. Cuozzo spoke about this situation; the decision was made to remove both Rodriguez and Ms. Bachand from the schedule until the matter could be investigated further. On October 5, 2017, both Rodriguez and Ms. Bachand were interviewed. *See* Exceptions 22 and 28. The highly salient and probative fact of the investigatory period, during which the situation and background documents relative to both Rodriguez and Ms. Bachand were considered,

[10] Despite Rodriguez' denials, Ms. Olden and Ms. Bachand (on whose behalf Rodriguez was allegedly arguing) both confirmed that Rodriguez was yelling at Ms. Olden. In this regard, Ms. Robertson testified about the statements made during the investigation by Ms. Olden and Ms. Bachand as follows:

> 19 Q. Santasha [Olden] was there and she's the one who told you what [Rodriguez]
> 20 was doing?
> 21 A. She did, Denise did as well.
> 22 Q. Denise told you that [Rodriguez] was yelling?
> 23 A. Yes.

See November 16, 2018 Transcript, pg. 214, lines 19 – 23.

[11] On October 2, 2017, contemporaneous with the incident, Ms. Olden informed Ms. Robertson that the confrontation had gotten "very loud." *See* November 16, 2018 Transcript, pg. 228, lines 23 – 25; pg. 229, lines 1 – 2.

was simply ignored by the ALJ in her decision. In this regard, the wholesale ignoring of the investigation was clearly intended and is used to support the ALJ's factually incorrect and legally improper conclusion ". . . that Cuozzo and the Respondent did not conduct the type of investigation where such taint would be a pressing concern." See Decision, 17:3 to 17:4.

iv. The October 5, 2017 Interview

During the October 5, 2017 interviews, Ms. Bachand confirmed Ms. Olden's description of the October 2, 2017 incident. *See* Exceptions 22 and 32. During her October 5, 2017 interview, Rodriguez was provided with the opportunity to explain the incident and to make any complaints

she believed were relevant and material.[12,13] Even Rodriguez conceded this fact.[14] It is important

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12

7	Q.	And do you believe that Ms. Rodriguez was given a free
8		opportunity to speak her mind?
9	A.	Oh, absolutely, absolutely.
10	Q.	And why do you say that?
11	A.	I made it perfectly clear that I was there just to hear
12		her side of the story and not pass any judgment at that time,
13		that I would, after hearing her side of the story, I would
14		speak to all the people who were involved with the argument and
15		I would review the things from the individuals and then we
16		would make a decision.

November 6, 2018 Transcript, pg. 256, lines 7 – 16.

13

25	Q.	Okay. Did she make a statement about what had happened in
1		September with a cook?
2	A.	She -- I recall her bringing up several incidents with
3		regards to the Assistant manager at that location, that she had
4		a personality conflict with. There was an issue with a cook,
5		there was an issue with another waitress, there was a litany of
6		things that were not necessarily contemporaneous with what I
7		was trying to find out that day.
8	Q.	But you let her speak her mind?
9	A.	Sure.
10	Q.	Do you recall how long the meeting was?
11	A.	I couldn't say exactly, but at least -- I would say at
12		least 30 minutes, maybe even longer.

November 6, 2018 Transcript, pg. 256, line 25; pg. 257, lines 1 - 12.

14

9	Q	But my question goes to the -- did any one of those three
10		people say we've had enough, you've got to stop talking, you
11		can't raise that issue, any words to that effect?
12	A	During the meeting?
13	Q	Yes.
14	A	No.

November 5, 2018 Transcript, pg. 158, lines 9 – 14.

to note that Rodriguez testified that she ". . . went **over the *whole* situation with Santosha** . . ." – which did not include the raising of the guest check issues. November 5, 2018 Transcript, pg. 159, lines 1, 10 – 12. Notably, Rodriguez also never mentioned the words 'age discrimination' during the interview, which is yet another salient and probative fact that the ALJ inexplicably ignored in her decision.[15] In fact, as Rodriguez testified, in the interview she presented her individual gripes concerning the unwillingness of the cook to violate Chip's' ordering policy (which forms the basis for Rodriguez' belief that the cook was to blame) and the unwillingness of Ms. Olden to violate Chip's' 'cutting' policy and procedure (which was the basis for Rodriguez' belief that Olden was 'mistreated').[16] *See* Exception 28. Ms. Robertson further confirmed that Rodriguez did not mention

[15] *See* November 6, 2018 Transcript, pg. 186, line 25; pg. 187, lines 1 – 6. *See also* November 6, 2018 Transcript, pg. 256, lines 7 – 24. *See also* November 6, 2018 Transcript, pg. 276, lines 22 – 25.

[16]

13 . . . I was trying to
14 follow company policies [by 'giving the pickle'] and I was also preventing a manager to
15 continue to mistreat one of my co-workers.

November 5, 2018 Transcript, pg. 125, lines 13 - 15.

any alleged age discrimination against Ms. Bachand by Ms. Olden.[17] *See* Exception 16. Incredibly, Rodriguez did not even mention age discrimination in the e-mail which preceded the interview.[18] *See* Exception 16. Mr. Cuozzo likewise confirmed that Rodriguez made personal complaints and did not make any allegation of age discrimination involving Ms. Bachand.[19,20] *See* Exception 16.

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[17] Ms. Robertson testified that Rodriguez did not complain about discrimination against Ms. Bachand.

25	Q.	Did she ever, at any point in time in that interview, use
1		the words age discrimination?
2	A.	No.
3	Q.	Did she say anything along those lines that could be
4		interpreted to mean that she was voicing concerns about some
5		sort of discrimination against Ms. Bachand?
6	A.	No.

November 6, 2018 Transcript, pg. 186, line 25; pg. 187, lines 1 – 6.

[18]

3	Q	This email GC-5 does not let anybody know that you were
4		complaining on behalf of others about Santosha Olden, correct?
5	A	Correct.

November 5, 2018 Transcript, pg. 128, lines 3 – 5.

[19]

17	Q.	Who did most of the speaking in that interview?
18	A.	I'd ask some simple questions, but Ms. Rodriguez basically
19		told her story.
20	Q.	Did she use the words age discrimination?
21	A.	That wasn't -- no, not that I can recall. That wasn't a
22		part of our investigation at all.
23	Q.	Did she use those words?
24	A.	No, sir.

November 6, 2018 Transcript, pg. 256, lines 7 – 24.

[20] Mr. Chatzopoulos confirmed, in addition to both Ms. Robertson and Mr. Cuozzo, that Rodriguez did not claim that Ms. Olden was engaging in discrimination against Ms. Bachand on the basis of her age. *See* November 6, 2018 Transcript, pg. 276, lines 22 – 25.

Of further import is the fact that Rodriguez did not mention any of the issues on the list that she claims was prepared by the servers. *See* Exception 28. This is amongst the unacceptably excessive number of highly salient and probative fact that were simply ignored by the ALJ in her decision.

Mr. Chatzopoulos also attended the October 5, 2017 interview.[21,22] Mr. Chatzopoulos recognized that Rodriguez was interested in criticizing Ms. Olden rather than addressing her own misconduct. Notably, Mr. Chatzopoulus testified that Rodriguez complained about Ms. Olden's conduct even though she engaged in similar behavior when she was a manager.[23] It was for this reason that Mr. Chatzopoulos tried to explain to Rodriguez what he believed was wrong with her October 2, 2017 conduct, including the fact that yelling at Ms. Olden in front of customers and co-workers was harmful to Chip's' business.[24] Mr. Chatzopoulos then explained to Rodriguez his concern that this incident was similar to the incident occurring two (2) weeks prior, on September

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[21]

2	Q.	Okay. Who was present when she was investigated?
3	A.	Initially it was me and the manager.
4	Q.	And then did somebody else enter into the investigation?
5	A.	Well, during our conversation Mr. Chatzopoulos had come by
6		and sat at the table as well.

November 6, 2018 Transcript, pg. 256, lines 2 – 6.

[22] Rodriguez asserts in her testimony that she wanted Mr. Chatzopolous' sister to attend the meeting. Even if Mr. Chatzopolous' sister was in Chip's management, Rodriguez never informed Chip's of her request and did not make any such request at the October 5, 2017 interview. *See also* November 6, 2018 Transcript, pg. 191, lines 15 - 19.

[23] Mr. Chatzopoulos testified about the things Rodriguez complained about, such as Ms. Olden not doing the job correctly, being on the phone, sitting and eating lunch, and being in the office; he also confirmed that Rodriguez engaged in similar behavior when she was a manager. *See* November 6, 2018 Transcript, pg. 289, lines 23 – 25; pg. 290, lines 1 – 4.

[24] Mr. Chatzopoulos likewise confirmed that Rodriguez' conduct regarding the decision to 'cut' Ms. Bachand from service was wrong. *See* November 6, 2018 Transcript, pg. 278, lines 3 – 7.

18, 2017, during which she yelled at a cook even though she violated Chip's Wethersfield's ordering policy and procedure.[25] Notably, Rodriguez admitted that she was aware of this procedure at the time she confronted the cook. *See* Exception 37. *See* Exhibit GCX10, September 19, 2017 E-mail. Rodriguez failed to accept Mr. Chatzopoulos comments and acknowledge that her actions during both incidents were improper and contrary to Chip's' business interests, Rodriguez chose instead to focus on her personal opinion of Ms. Olden.[26]

After the interviews, Ms. Robertson considered the comments and reactions of both Ms. Bachand and Rodriguez to the questions being asked about the October 2, 2017 incident, as well as about prior insubordination incidents. *See* Exception 35 and 37. As to Ms. Bachand, Ms. Robertson concluded that Ms. Bachand understood that confronting an assistant manager and questioning management in an insubordinate, hostile and highly disruptive manner was not proper. ***See*** Exceptions 31 and 39. However, Ms. Robertson also concluded that while Ms. Bachand had initially questioned the assistant manager, it was Rodriguez (and not Ms. Bachand) who had yelled at the assistant manager in front of and observable (by hearing or otherwise) to customers and co-workers. *See* Exceptions 36 and 38. It was this understanding that led Ms. Robertson to conclude that an additional week suspension was appropriate discipline for Ms. Bachand. *See* Exceptions 37 and 39. As to Rodriguez, Ms. Robertson concluded that she was completely unwilling to acknowledge her repeatedly insubordinate and disruptive conduct such that it was expected to

[25] Mr. Chatzopoulos confirmed that Rodriguez' conduct regarding the placing of the order was improper, and that her failure to follow protocol was not about customer service or 'giving the pickle' as Rodriguez claimed. *See* November 6, 2018 Transcript, pg. 279, lines 6 – 14.

[26] Mr. Chatzopoulos likewise confirmed that Rodriguez did not admit that her behavior was wrong. *See* November 6, 2018 Transcript, pg. 277, lines 21 – 22.

continue. *See* Exception 37.[27] This conduct, coupled with Rodriguez' prior disciplinary history, supported Ms. Robertson's additional conclusion that Rodriguez' insubordinate and disruptive behavior was becoming a pattern that was negatively affecting Chip's' business. *See* Exception 37. These reasons led Ms. Robertson to ultimately conclude that Rodriguez' discharge was appropriate. *See* Exception 37. Mr. Cuozzo and Mr. Chatzopoulos were informed of these decisions and communicated their agreement to Ms. Robertson.[28] *See* Exceptions 31 and 37. *See* November 6, 2018 Transcript, pg. 191, lines 4 – 9. Ms. Robertson communicated the discharge decision to Rodriguez on October 8, 2017. And, to the continuing litany of highly salient and probative facts ignored by the ALJ is the fact that documentary evidence supports the testimony concerning the investigatory procedure, how the discharge decision was made and by whom. *See* Exception 31. In other words, the ALJ ignores such facts in order to produce the legally and factually unsupportable conclusion that Rodriguez was involved in the exercise of a Section 7 right on October 2, 2018 and that Chip's Wethersfield violated this right on October 8,2017 in violation of Section 8(a)(1). *See Decision*, pg. 18:9 to 18:10.

II. QUESTIONS TO BE ARGUED

In the *Decision*, the ALJ sustained the General Counsel's allegations that Chip's Wethersfield, LLC violated Section 8(a)(1) as follows:

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[27] *See Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595, 603 (1st Cir. 1979) ("The Board denigrates the Company's business justifications for the discharge, touting Agacinski's sterling sales record as an indication of the Company's illegal motive in the discharge. As we have emphasized in our past decisions, it is neither the Board's function, nor indeed ours, to second-guess business decisions. 'The Act was not intended to guarantee that business decisions be sound, only that they not be the product of antiunion motivation (emphasis in original).'' *NLRB v. Rich's of Plymouth, Inc.*, supra, 578 F.2d at 887 n.9, *quoting from Stone & Webster Engineering Corp. v. NLRB*, supra, 536 F.2d at 467.").

[28] Mr. Chatzopoulos confirmed that he did not make the decision to discharge Rodriguez, but that he concurred with that decision. *See* November 6, 2018 Transcript, pg. 277, lines 9 - 12.

a. "[It] discriminated in violation of Section 8(a)(1) of the Act on October 8, 2017, when it discharged Rodriguez based on her protected concerted activity."

b. "[It] violated Section 8(a)(1) of the Act when, on October 4, 2017, Cuozzo informed Rodriguez by e-mail that employees were prohibited from discussing with other employees work-related incidents and managers' statements."

The questions to be argued pertain to these two findings. The first question to be argued asks whether the ALJ correctly found, as a matter of law and fact, that Chip's Wethersfield, LLC violated Section 8(a)(1) of the Act – on October 8, 2017 – when it discharged Rodriguez. Due to the nature of the allegations and the evidence (both documentary and testimonial), there are multiple exceptions to the *Decision* which apply to this issue. See Exceptions 1 to 3 and 5 to 41. The second question to be argued asks whether the ALJ correctly found, as a matter of law and fact, that Chip's Wethersfield, LLC violated Section 8(a)(1) of the Act – on October 4, 2017 – when Anthony Cuozzo sent an e-mail to Rodriguez stating, as found, that "that employees were prohibited from discussing with other employees work-related incidents and managers' statements." The exceptions to the *Decision* which applies to this issue is Exception 4.

Notably, as to the October 8, 2017 violation, the ALJ fails to specify the nature of the 'protected concerted activity' in the conclusion of law. A third question is whether this ambiguity acts to preclude the entry of the Order as to that finding.

III. ARGUMENT

A. THE *ATLANTIC STEEL* TEST FAVORS CHIP'S WETHERSFIELD, LLC

The ALJ's decision is not supported by the facts and it is based on a fundamental error of law, specifically concerning the four factors analyzed in support of her conclusion as per *Atlantic Steel Co.*, 245 NLRB 814 (1979). *See* Exception 1. The *Atlantic Steel* test analyzes the following for (4) factors in relation to Rodriguez' conduct: (a) the place of the discussion; (b) the subject

matter of the discussion; (c) the nature of the outburst; and (d) whether Rodriguez' outburst was provoked by the Chip's Wethersfield's unfair labor practice.' *See Decision* at 14:30 to 14:40.

As to the first factor, the place of the discussion was not entirely segregated from the customers and was not separated such that customers and co-workers could not hear the altercation. *See Rich Prods.*, 2017 NLRB LEXIS 167, *47 (N.L.R.B. April 6, 2017) ("By contrast, the location of an employee's outburst weighs against protection of the Act when 'the employee engages in insubordinate or profane conduct toward a supervisor in front of other employees, regardless of whether there is a likelihood that other employees were exposed to the misconduct.' *Starbucks Corp.*, 354 NLRB 876, 878 (2009); *see also Verizon Wireless*, 349 NLRB 640, 642 (2007) (finding that the first factor of the *Atlantic Steel* analysis weighed in favor of losing protection where the conduct occurred in an area where both supervisory and nonsupervisory personnel were likely to hear the employee's profane comments)."). Pursuant to *Rich*, because the location of the confrontation was in the server aisle where co-workers are often present and not entirely segregated from customers, the location of the confrontation does not satisfy the first factor of *Atlantic Steel*.

As to the second factor, the subject matter of the confrontation, the ALJ mistakenly relies upon reasoning from a wholly distinguishable fact pattern to incorrectly support her finding. Specifically, in *Hacienda Hotel*, the Board explained that a group of employees protesting the alleged mistreatment of another employee *as a group complaint* is within the rubric of a concerted activity. *See Hacienda Hotel, Inc.*, 348 N.L.R.B. 854, 864, 2006 NLRB LEXIS 453, *60 (N.L.R.B. September 29, 2006) ("Hernandez and the other employees went to Perez in order to protest her alleged mistreatment of two housekeeping employees, whom she supervised, and the Board has long held that group complaints about the quality of supervision are directly related to working conditions and fall within the 'rubric' of protected concerted activities."). In the instant matter,

however, Rodriguez confronted Ms. Olden on her own and without authorization from Ms. Bachand. *See* Exception 25. In other words, the finding that "Rodriguez and Bachand were protesting" together – or concertedly – is simply not supported by the record evidence. *See Decision*, pg. 14:9 to 14:10. *See* Exception 25. Similarly, the ALJ's attempt to tie Rodriguez' confrontation of Ms. Olden to the list created by the servers is wholly unavailing because the list did not contain any claim that the 'cutting' process (which is what Rodriguez was protesting) was of concern to the group. *See* Exception 26. The subject matter of the confrontation does not satisfy the second factor of *Atlantic Steel*.

As to the third factor, the nature of the outburst, the ALJ mistakenly finds that "Rodriguez' protest does not, in [her] view, even rise to the level of an 'outburst.'" *See Decision*, pg. 14:17 to 14:18. In this regard, the ALJ improperly credits Rodriguez' testimony and unfairly rejects the reports of the other two witness/participants to the confrontation. *See* Exceptions 10 and 22. Similarly, the ALJ fails to apply the adverse inference that arises against Rodriguez, who could have (and can reasonably expected to have been required to) produce Ms. Bachand to testify on her behalf since, as the ALJ asserts, "Rodriguez and D. Bachand were protesting [together]". *See*

Exception 7.[29] *See Decision*, 14:9. As a result, the ALJ failed to base her decision on the "preponderance of the testimony" as required by the Act. 29 U.S.C. § 160(c). The nature of the outburst does not satisfy the third factor of *Atlantic Steel*.

As to the fourth factor, whether Rodriguez' outburst was provoked by the Chip's Wethersfield's unfair labor practice, not even the ALJ finds that it weighs in favor of protection. In this regard, the ALJ correctly notes that Rodriguez was not provoked by an unfair labor practice. *See Decision*, pg. 14:32. Despite finding that Chip's Wethersfield *did not engage in an unfair labor practice*, the ALJ nonetheless compounds the error by asserting, without evidentiary basis, that "Rodriguez' protest was provoked by what she believed to be another example of Olden's unfair treatment of a co-worker, a matter that a group of servers had already complained about to management." *See Decision*, pg. 14:38 to 14:40. In this regard, the ALJ conflates the subject matter of the outburst, or the second element, with there having been a circumstance sufficient to trigger the outburst. *See Starbucks Coffee Co.*, 354 N.L.R.B. 876, 878, 2009 NLRB LEXIS 343, *15 (N.L.R.B. October 30, 2009) ("There is no evidence that the Respondent provoked Saenz' misconduct. Although we have found several unfair labor practices in this case, none were directed

[29] *Petro-Chem. Insulation, Inc.*, 1997 NLRB LEXIS 814, *89-91 (N.L.R.B. September 30, 1997) (citing *National Football League*, 309 NLRB 78, 97-98 (1992) ("The adverse inference rule states that, when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. An inference may even be warranted that the material which the party refuses to show supports exactly the opposite of what he contends at the hearing. As Professor Wigmore has said: 'the failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, served to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference is not doubted.' [2 Wigmore, *Evidence Sec 285* (Chadbourn rev. 1979].").

at Saenz, and the most recent unfair labor practice prior to this incident occurred 2 months earlier and at a store other than the one where Saenz worked. Nor was Saenz spontaneously reacting to a stressful situation such as a grievance meeting, disciplinary action, or tense workplace situation."). As the record evidence establishes, Ms. Olden's manager (Ms. Robertson) 'cut' Ms. Bachand from service; Ms. Olden complied with that directive by not allowing Ms. Bachand to serve a new customer after having been 'cut' from service; Ms. Bachand did not agree with not being allowed to take a new customer after having been 'cut' (as per policy), but acquiesced to Mr. Robertson's directive; and then Ms. Rodriguez separately confronted Ms. Olden in the server aisle. *See* Exceptions 20 – 24.[30] The circumstances surrounding the outburst do not satisfy the fourth factor of *Atlantic Steel*. It should also be noted that the highly salient and probative fact (of Ms. Robertson as the decision-maker relative to Rodriguez' discharge and of Ms. Robertson as the decision-maker relative to Bachand having been 'cut' from service) was ignored by the ALJ in her decision. The other highly salient and probative fact that was ignored is the absence of *any* evidence to support a belief that Ms. Robertson, as decision-maker, was aware of the guest check list that is being used by the ALJ to tie together the disparate and unconnected occurrences.

The ALJ incorrectly found that "the first three *Atlantic Steel* factors, taken together, weigh heavily in favor of continued protection and that the fourth factor is neutral." *See Decision*, pg. 14: 42 to 14:43. For the foregoing reasons, the ALJ incorrectly found that Rodriguez was disciplined for engaging in a protected activity or that her conduct was the 'res gestae' of the allegedly protected concerted activity. The *Atlantic Steel* factors are not satisfied, and Chip's Wethersfield did not violate the Act as alleged. The charge should be dismissed.

[30] *See Petro-Chem. Insulation, Inc.*, 1997 NLRB LEXIS 814, *89-91 (N.L.R.B. September 30, 1997).

B. THE *WRIGHT LINE* ANALYSIS FAVORS CHIP'S WETHERSFIELD, LLC

The ALJ takes note of the fact that the post-hearing brief of Chip's Wethersfield cites *Wright Line*, 251 NLRB 1083 (1980). This is because Chip's Wethersfield believed, and still believes, that the *Wright Line* analysis applies to Rodriguez' allegations. *See Decision* at 15, n.19. The ALJ's decision to discard *Wright Line* is not supported by the facts contained in the record and is also based on a fundamental error of law.[31] See Exceptions 2 and 3. In this regard, Chip's Wethersfield correctly takes exception to the ALJ's transfer of the burden from the General Counsel to Chip's Wethersfield.

As noted above, the *Atlantic Steel* analysis fails to justify the ALJ's determination. As noted below, the *Wright Line* analysis similarly fails to justify the ALJ's determination. Each of

[31] *See Inova Health Sys.*, 360 N.L.R.B. 1223, 1226, 2014 NLRB LEXIS 538, *18-19 (N.L.R.B. June 30, 2014) (emphasis added) ("To establish a Section 8(a)(1) violation based on an adverse employment action ***where the motive for the action is disputed***, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982). The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity. *See Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004) (If the General Counsel meets his burden, the burden 'shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.' *Id*. (*quoting Wright Line*) (other internal citations omitted).") *See also Pareco, Inc.*, 269 N.L.R.B. 1027, 1042, 1984 NLRB LEXIS 851, *75-76 (N.L.R.B. April 16, 1984) ("When the specific conduct which General Counsel's representative would characterize as statutorily protected . . . has, likewise, been cited by a concerned employer as constituting his purportedly legitimate business reason for imposing discipline – or effectuating a discharge – this Board normally determines that concerned employer's statutory culpability, or non-culpability, by applying a so-called 'balancing' test. *N.L.R.B. v. Prescott Industrial Products Co.*, 500 F.2d 6, 10 (C.A. 8). The General Counsel's "burden never shifts, and . . . the discrediting of any of Respondent's evidence does not, without more, constitute affirmative evidence capable of sustaining or supporting the General Counsel's obligation to prove his case." *KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975); *see also NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) ('The mere disbelief of testimony establishes nothing.').") (emphasis in original).

the four factors supports the dismissal of this charge.[32] It should be noted that the ALJs analysis of the four *Wright Line* factors is legally deficient, including for the reasons that the entire analysis is briefly mentioned in a single paragraph in footnote 19 that fails to separately address each factor. It is also legally deficient because it fails to address the fact that the General Counsel bears the burden of proof (by the preponderance of the evidence standard) pursuant to *Wright Line*.

The ALJ's formulation and analysis of the prima facie case standard fails to support the first *Wright Line* factor, which the ALJ defines as Rodriguez having engaged in a protected activity on October 2, 2017. *See Decision* at 15:19 – 15:22.; *See Decision* at 15, n. 19. This analysis is similar to the analysis of the third factor of the *Atlantic Steel* analysis, including for the reason that the ALJ relies solely upon *Hacienda Hotel* and its *Wright Line* analysis. *See Hacienda Hotel, Inc.*, 348 N.L.R.B. 854, 864, 2006 NLRB LEXIS 453, *60 (N.L.R.B. September 29, 2006) ("Hernandez and the other employees went to Perez in order to protest her alleged mistreatment of two housekeeping employees, whom she supervised, and the Board has long held that group complaints about the quality of supervision are directly related to working conditions and fall within the 'rubric' of protected concerted activities."). In the instant matter, however, Rodriguez confronted Ms. Olden on her own and without authorization from Ms. Bachand. *See* Exceptions 7, 24, and 25. In other words, the ALJ's finding that "Rodriguez and Bachand were protesting" together is simply unsupported by the record. *See Decision*, pg. 14:9 to 14:10. *See* Exception 24. Similarly, the ALJ's attempt to tie Rodriguez' confrontation of Ms. Olden to the list created by the servers is wholly

[32] "[T]he General Counsel must first show the existence of activity protected by the Act . . . Second, the General Counsel must show that the employer was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link or nexus between the employee's protected activity and the adverse employment action." *Auto Nation, Inc.*, 360 N.L.R.B. 1298, 1326, 2014 NLRB LEXIS 547, *148 (N.L.R.B. July 9, 2014).

unavailing because the list did not contain any claim that the 'cutting' process, which is what Rodriguez was protesting' on October 2, 2019, was of any concern to the group. *See* Exception 26. The first prima facie element of the *Wright Line* analysis is not satisfied.

The ALJ's formulation of the prima facie case fails to support the *Wright Line* second factor, which is defined as 'employer knowledge of the October 2, 2017 protected activity.' *See Decision* at 15, n. 19. In this regard, the ALJ does not cite to any record evidence that the decision-maker had any knowledge that Rodriguez was engaged in a protected activity on October 2, 2017. First, the list of server complaints about Bachand was collected by Rodriguez and, per her testimony, was given by her to Joel Martinez. There is no evidence to support a belief that Mr. Martinez was a decision-maker or gave this information to the disciplinary decision-makers for Chip's Wethersfield. In addition, the ALJ fails to note or analyze Rodriguez' failure to call Mr. Martinez to testify. *See* Exceptions 17, 18 and 28. An adverse inference, which provides that a party's failure to provide evidence within her control gives rise to an inference that the evidence is unfavorable to her, applies against Rodriguez as a result. *See* Exception 7. *See Petro-Chem. Insulation, Inc.*, 1997 NLRB LEXIS 814, *89-91 (September 30, 1997). Second, there is no evidence that Mr. Chatzopoulos, Ms. Robertson or Mr. Cuozzo had any knowledge of the list. *See* Exception 17. In this regard, if as the ALJ asserts the October 2 incident is an extension of the previously created server list of issues, then this prima facie element can only be satisfied with evidence that the indicated individuals had knowledge of list. If, alternatively, it is asserted that the October 2, 2017 incident is the protected activity, then the General Counsel would have to submit evidence that the decision-makers were aware that Ms. Bachand and Rodriguez acted in concert, which could have included Ms. Bachand asking Rodriguez to confront Ms. Olden on her behalf. The record establishes that Rodriguez confronted Ms. Olden without acting in concert with

Ms. Bachand. *See* Exceptions 7, 24, and 25. The second prima facie element of the *Wright Line* analysis is not satisfied.

The third prima facie element of the *Wright Line* analysis is satisfied by virtue of Rodriguez' discharge.

The ALJ's formulation of the prima facie case fails to support the *Wright Line* fourth factor, which is defined as 'a nexus between the protected activity and the adverse employment action.' *See Decision* at 15, n. 19. As noted above, there is no evidence of a nexus between the list of complaints and the adverse employment action following the October 2, 2017 confrontation. It is further submitted that there can be no such nexus because there is no evidence that Laura Robertson or Anthony Cuozzo had any knowledge of the list. *See* Exception 17. If, alternatively, it is asserted that the October 2, 2017 incident is the protected activity, then (as noted above) the decision-makers would have had to have been aware that Ms. Bachand and Rodriguez acted in concert, which could have included Ms. Bachand asking Rodriguez to confront Ms. Olden on her behalf. The record fails to establish this point. *See* Exceptions 7, 24, and 25. Notably, an adverse inference applies against Rodriguez because she failed to call Ms. Bachand to testify. *See* Exception 7. Therefore, there can be no nexus. The fourth prima facie element of the *Wright Line* analysis is not satisfied.

Even if the ALJ had properly assessed the four *Wright Line* factors, the ALJ subsequently failed to consider Chip's Wethersfield's legitimate business interest in discharging Rodriguez. The ALJ applied an improper standard by merely discrediting the legitimate business interest advanced by Chip's Wethersfield rather than considering whether it has expressed a legitimate business

interest.[33] *See* Exceptions 3, 19, 32 and 37. The ALJ furthermore substituted her own personal judgment, and bias, in deciding that the reasoning of Chip's Wethersfield was 'bad' rather than considering the information available to it at the time.[34] *See* Exception 6. In this regard, Chip's Wethersfield takes exception to the ALJ's decision to override its legitimate business decision regarding Rodriguez' discipline. If, alternatively, it is asserted that the October 2, 2017 incident is the protected activity, then the record evidence would have to bear out that the decision-makers were aware that Ms. Bachand and Rodriguez acted in concert, which could have included Ms. Bachand asking Rodriguez to intercede on her behalf. Notably, an adverse inference applies against Rodriguez because she failed to call Ms. Bachand to testify. *See* Exception 7. Fortunately, the record establishes that Rodriguez confronted Ms. Olden without acting in concert with Ms. Bachand. *See* Exceptions 7, 24, and 25. *See KBM Electronics, Inc.*, 218 N.L.R.B. 1352, 1358-1359, 1975 NLRB LEXIS 761, *37 (N.L.R.B. June 30, 1975) ("[T]he Board may not 'substitute [its] judgment for the Respondent's business judgment' in dismissing an employee. *Thurston*

[33] *See Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004) (If the General Counsel meets his burden as to all three elements, the burden "'shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.' *Wright Line*, supra at 1089.") *See also KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975) ("[T]he discrediting of any of Respondent's evidence does not, without more, constitute affirmative evidence capable of sustaining or supporting the General Counsel's obligation to prove his case."). In this regard, Chip's Wethersfield takes exception to the ALJ's decision to override its legitimate business decision regarding Rodriguez' discipline. *See KBM Electronics, Inc.*, 218 N.L.R.B. 1352, 1358-1359, 1975 NLRB LEXIS 761, *37 (N.L.R.B. June 30, 1975) ("[T]he Board may not 'substitute [its] judgment for the Respondent's business judgment' in dismissing an employee. *Thurston Motor Lines, Inc* ., 149 NLRB 1368 (1964). See, also, *N.L.R.B.* v. *United Parcel Service, Inc* ., 317 F.2d 912, 914 (C.A. 1, 1963).").

[34] *See Healthcare Emples. Union, Local 399 v. NLRB,* 463 F.3d 909, 921 – 922 (9th Cir. 2006) (quoting *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964)) (The "crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change.").

Motor Lines, Inc ., 149 NLRB 1368 (1964). See, also, *N.L.R.B.* v. *United Parcel Service, Inc* ., 317 F.2d 912, 914 (C.A. 1, 1963).”). Chip’s Wethersfield did not violate the Act; the charge should be dismissed.

C. CUOZZO’S E-MAIL DOES NOT QUALIFY AS A SECTION 8(A)(1) VIOLATION

The ALJ reviews Mr. Cuozzo’s October 4, 2017 e-mail in a vacuum. This is wholly inappropriate, and underscores why in this situation the public policy favoring the confidentiality of workplace investigations is so important. *See* Exception 4. The e-mail (GCX7) was written in response to a prior e-mail from Rodriguez (GCX5) in which Rodriguez engages in speculation about what Ms. Olden is saying.[35] Specifically, she claims that Ms. Olden “. . . was going around the store talking about the incident and saying: ‘These servers better not think they are getting away with this, I have Laura and Anthony on my side and servers are going to be moved around to other stores.’ See GCX5. This is clearly idle speculation and gossip, which also clearly involves third-parties who are communicating with Rodriguez. In response, so that he and Ms. Robertson can ‘get to the bottom’ of what happened, he asked Ms. Rodriguez – and only Ms. Rodriguez – not to engage in idle gossip and speculation about what Ms. Olden might (or might not be) saying. In such circumstances, there is clearly a business justification in preventing gossip that would impair the ability of an employer to discern the true nature of what happened.

[35] *See* Exhibit GCX7, October 4, 2017 E-mail (“Please allow the process to continue and allow Laura to conduct her inquiry.”). Mr. Cuozzo also made it clear that he was not prohibiting Rodriguez from speaking about matters of which she was personally aware (instead hoping to avoid ‘idle chatter,’ ‘gossip’ and ‘speculation’). *See* Exhibit GCX7, October 4, 2017 E-mail. In this regard, Mr. Cuozzo expressly precluded “. . . conversations with the management team . . . [where she was a] witness to the conversations personally” from the reference to idle chatter and gossip. *See* Exhibit GCX7, October 4, 2017 E-mail from Anthony Cuozzo. That correspondence, reviewed objectively as required by the Act, does not stifle Rodriguez’ Section 7 rights.

Additionally, employers must be aware of the nature of claims that might be made against them if adverse employment actions are taken. As of October 4, 2019, the interviews of the participants had not occurred and the outcome of the investigation was uncertain. However, the majority of claims brought against employers in similar circumstances are discrimination and retaliation claims that fall within the jurisdiction of the Equal Employment Opportunity Commission (hereinafter, the "EEOC") and the Connecticut Commission on Human Rights and Opportunities (hereinafter, the "CHRO"). In fact, there is a pending discrimination claim in this matter, which Rodriguez brought pursuant to the Connecticut Fair Employment Practices Act. *See* November 6, 2017 Deposition Transcript, pg. 292, lines 1 – 5.

The circumstances faced by the Chip's Wethersfield create an untenable situation, which is exposed by both the ALJ's ruling and the reality of Rodriguez' complaints in two forums with wholly different rules. Therefore, there should be a public policy by which the NLRB recognizes – when the confidentiality of an investigation is required for compliance with the conflicting directives of another federal agency or a state agency – that there exists a legitimate business need for confidentiality (such that there is no Section 7 violation). This should be especially true when the confidentiality requested, as here, is short-lived and limited in scope.

In this regard, it is notable that the ALJ cited *Hyundai American Shipping Agency*, 357 NLRB 860 (2011), which she recognizes as having been vacated on other grounds. However, a clear reading of the vacating opinion confirms that District Courts recognize the need for a public policy as noted above. As the *Hyundai American Shipping Agency* Court explained:

> Hyundai argues that federal and state antidiscrimination statutes and guidelines, which require confidentiality in many investigations, constitute a legitimate and substantial business justification for its rule. For example, Equal Employment Opportunity Commission guidelines suggest that information about sexual harassment allegations, as well as records related to investigations of those allegations, should be kept confidential. Enforcement Guidance on Vicarious

> Employer Liability for Unlawful Harassment by Supervisors, § V(C)(1) (915.002, June 18, 1999), available at http://www.eeoc.gov/policy/docs/harassment.html. We agree that the obligation to comply with such guidelines may often constitute a legitimate business justification for requiring confidentiality in the context of a particular investigation or particular types of investigations.

Hyundai Am. Shipping Agency, Inc. v. NLRB, 420 U.S. App. D.C. 64, 69, 805 F.3d 309, 314 (2015). The Court went on to explain that the policy at issue was simply too broad to be upheld. In this regard, the Court then explained as follows:

> In enforcing the Board's order, we need not and do not endorse the ALJ's ***novel view*** that in order to demonstrate a legitimate and substantial justification for confidentiality, an employer must 'determine whether in any give [sic] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.' *Order*, 2011 NLRB LEXIS 498, 2011 WL 4830117, at *27. Instead, we simply hold that Hyundai's confidentiality rule was so broad and undifferentiated that the Board reasonably concluded that Hyundai did not present a legitimate business justification for it.

Hyundai Am. Shipping Agency, 420 U.S. App. D.C. at 69. As explained below, and regardless of the ALJ's characterization the request by Mr. Cuozzo, the need to stop gossip and chatter so as to maintain the integrity of the investigation constituted a legitimate business need. The manner of the request was not overly broad and undifferentiated, as in *Hyundai*, but was instead narrow and specifically tailored to the single incident that was being investigated.

Ultimately, the ALJ committed reversible error in her findings of fact and conclusions of law by holding that Chip's Wethersfield violated Section 8(a)(1) of the Act when Mr. Cuozzo sent the e-mail to Rodriguez. *See Decision* at 16:1 to 17:22. *See* Exception 4. The decision of the ALJ is not supported by the facts and is based on a fundamental error of law, including as to the related findings that: (a) the e-mail constituted interference with employees' rights under Section 7 and that (b) there could be no legitimate business interest to support the request contained therein. *See Decision* at 16:1 to 17:22. *See also Hyundai Am. Shipping Agency*, 420 U.S. App. D.C. at 69.

First, Mr. Cuozzo contacted Rodriguez and asked her, by e-mail, not to engage in 'idle chatter or gossip' regarding the incident that was being investigated. The response to Rodriguez' email, which contained gossip, was not an attempt to stifle her and did not restrict any attempt she might have made to obtain the aid of her co-workers or to discuss any other term or condition of employment. In fact, Rodriguez made no such allegation in either the initial charge or in the amended charge. Second, there was also no attempt to stifle discussion of other matters, including as to any discipline received.[36] The focus was on the investigation being conducted – with the intention of preventing idle chatter or gossip (which had already occurred) from impairing the investigation. Additionally, Mr. Cuozzo did not make any statements in the e-mail that could reasonably be interpreted as attempting to prevent Rodriguez from bringing a complaint or obtaining statements from co-workers for future complaints. Further, the correspondence does not seek generally to warn Rodriguez against (or threaten discipline for) speaking to co-workers about employment related matters. For these reasons, Chip's Wethersfield had a legitimate business interest in the limited scope of Mr. Cuozzo's e-mail.

[36] The ALJ cites, for example, *Verizon Wireless*, 349 NLRB 640 (2007) in support of the determination. However, the *Verizon Wireless* is distinguishable because in it the Board was discussing a work rule prohibition against the discussion of discipline received by employees. *See* Cellco P'ship , 349 N.L.R.B. 640, 658, 2007 NLRB LEXIS 115, *94 (N.L.R.B. March 28, 2007) ("In *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999), the Board held that the respondent maintained an overly broad confidentiality rule by prohibiting employees from discussing their discipline with other workers. There was no proof of a legitimate business justification for the imposition of this prohibition. The Board held that such a rule 'constitutes a clear restraint on employees' right to engage in concerted activities for mutual aid and protection concerning undeniably significant terms of employment . . . Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights.").

As an additional consideration, Chip's Wethersfield notes that the NLRB in *Easy Neighborhood Market* explained the lawfulness of a similar, narrowly tailored limitation. As the NLRB explained,

> . . . as part of her investigation into Elias' sexual harassment complaint, Jackson instructed Elias not to obtain additional statements from her coworkers in connection with that complaint. Jackson's instruction to Elias was narrowly tailored to address the Respondent's need to conduct an impartial and thorough investigation. Elias was specifically told that, in relation to the investigation, she should let Jackson obtain any additional statements. Jackson did not prohibit Elias from discussing the pending investigation with her coworkers, asking them to be witnesses for her, bringing subsequent complaints, or obtaining statements from coworkers in future complaints. . . . Jackson's instruction would reasonably be viewed as seeking to safeguard the integrity of the investigation, not restrict[ing] Elias in the exercise of her Section 7 rights.

Fresh & Easy Neighborhood Market, Inc., 2014 NLRB LEXIS 627 at *38 – 39 (August 11, 2014). Without conceding that Rodriguez actually exercised any Section 7 rights, the foregoing reasoning easily applies to the instant matter (and Chip's Wethersfield was entitled to rely upon its reasoning).

Chip's did not violate Section 8(a)(1) of the Act by investigating the October 2, 2017 incident or by ensuring the integrity of that investigation.

IV. CONCLUSION

Chip's Wethersfield did not violate Section 8(a)(1) of the Act by discriminating against Rodriguez on October 8, 2017. Chip's Wethersfield also did not violate Section 8(a)(1) of the Act when Anthony Cuozzo sent the October 4, 2017 e-mail to Rodriguez regarding idle chatter and gossip. The charge should be dismissed.

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CHIP'S FAMILY RESTAURANT

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CERTIFICATE OF SERVICE

In addition to filing this *Chip's Wethersfield's Brief in Support of its Exceptions to the Administrative Law Judge's Decision* via the NLRB's electronic filing system, we hereby certify that copies have been served this 23rd day of October 2019, by electronic mail, upon:

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